APPEAL NO. 93045

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on December 16, 1992, (hearing officer) presiding as hearing officer. She determined that the impairment rating of the designated doctor was not in compliance with the correct version of the Guides to the Evaluation of Permanent Impairment, Third Edition, American Medical Association (AMA Guides), and returned the case to the disability determination officer for appointment of a designated doctor to settle the impairment rating dispute. Appellant (carrier) urges error in the hearing officer's rejection of the designated doctor's report assessing an impairment rating since the rating is entitled to presumptive weight. Respondent asks that the decision be affirmed.

DECISION

Finding error in the decision and order of the hearing officer, we reverse and remand.

The single issue in this case concerned what the claimant's correct impairment rating was. The claimant's compensable back injury was not in issue. The evidence showed that the claimant had been treated by a number of doctors (some of whose reports were admitted into evidence) and that ultimately a Report of Medical Evaluation, Texas Workers' Compensation Commission Form 69 (TWCC-69) was submitted by her treating doctor, a carrier selected doctor and a Commission designated doctor. The thrust of the claimant's position at the hearing was that the great weight of the medical evidence offered by the claimant was contrary to the designated doctor's impairment rating and, therefore, the designated doctor's report should not be given presumptive weight under Article 8308-4.26(g). The designated doctor's report admitted into evidence indicated on the face of the TWCC-69 "[u]tilizing the Chart on page 53 Table II B." Although not raised or discussed at the hearing, the hearing office found and concluded in her decision that the designated doctor did not follow the correct AMA Guides. (Claimant did assert that the designated doctor did not indicate what version of the AMA Guides he used. We have previously held that an affirmative statement that a designated doctor used the AMA Guides provided by the 1989 Act is not required. *See* Texas Workers' Compensation Commission Appeal No. 92393, decided September 17, 1992.) The hearing officer's findings and conclusions in dispute are:

FINDINGS OF FACT

9. There is no Table II on page 53 of the AMA Guides to the Evaluation of Permanent Impairment (third edition); and the only tables on that page (Table 24 and 25) deal with amputation and other problems with the toes.

10. In assessing CLAIMANT'S impairment rating, (designated doctor) did not follow the AMA Guides to the Evaluation of Permanent Impairment (third edition) as required by Article 8308-4.24, Tex. Rev. Civ. Stat. Ann.

11.(Designated doctor's) impairment rating is invalid because he did not follow the AMA Guides to the Evaluation of Permanent Impairment (third edition).

12.A dispute still exists regarding CLAIMANT'S correct impairment rating.

CONCLUSIONS OF LAW

2.The impairment rating assessed by the designated doctor shall not be adopted by the commission because it was not made in accordance with the AMA Guides to the Evaluation Of Permanent Impairment (third edition).

3.The dispute regarding CLAIMANT'S correct impairment rating has not been resolved.

The hearing officer's Finding of Fact No. 12 and Conclusion of Law No. 3 might well be correct but that is the very matter of concern in this case. It would appear the matter concerning possible problems in the designated doctor's report could have been readily cleared up prior to the final conclusion of the contested case hearing rather than unnecessarily prolonging the dispute resolution process in this case. To be sure, we can not determine with certainty whether the designated doctor utilized the correct version of the AMA Guides, as suggested by the carrier in its request for review. Carrier posits that "[w]ith very little effort it is obvious that [designated doctor's] report should have read Utilizing the Chart on Table 53, Table II B, page 80" and suggests "[a] small amount of effort on the part of the claimant's attorney or the Hearing Officer would have discovered this." Suffice it to say, (and we note that the correction suggested by carrier does not square with the AMA Guides available to the Appeals Panel), that such "little effort" would have been speculative at most and an unsatisfactory resolution of the problem. Rather, as we have stated in previous decisions, corrective action is appropriate and should have been taken by the hearing officer to preclude unnecessarily prolonging the case. Our language in Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, is instructive in this regard:

> The use of a designated doctor is clearly intended under the Act to assign an impartial doctor to finally resolve disputes of MMI and impairment rating. As we noted recently in Texas Workers' Compensation Commission Appeal No 92570, decided December 14, 1992, it is important to realize that the designated doctor, unlike a treating doctor or a doctor for whom a carrier seeks a medical examination order under Article 8308-4.16, serves at the request of the Commission. We believe that it is the responsibility of the Commission, and not of either of the parties, to ensure that the designated doctor completes the TWCC-69 form or otherwise supplies the information required under Texas

> Workers' Compensation Rules, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1). If information is nevertheless missing or unclear by the time that the contested case hearing officer is asked to evaluate the designated doctor's report, it is appropriate for the hearing officer, in carrying out his or her responsibilities to fully develop the facts required, in accordance with Article 8308-6.34(b), to seek that additional information. Moreover, direct contact between the Commission and its appointed designated doctor will serve to discourage unilateral contact from either side following the examination that could serve to undermine the perception that the designated doctor is impartial. *See* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

If, in this case, there was a simple mistake in citing the correct page, table, chart or whatever, it could have been easily cleared up. If an incorrect version of the AMA Guide was used, the designated doctor could be requested to utilize a correct version and amend, if necessary, his report. *See* Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 93035, decided February 24, 1993. In Texas Workers' Compensation Commission Appeal No. 93028, decided February 26, 1993, we reversed and remanded where the hearing officer invalidated the designated doctor's impairment rating on his own initiative, and without allowing or soliciting any comments from the parties, when he received a document after the opening hearing aspect of the contested case hearing and in which document it was indicated that the correct version of the AMA Guides had not been used. We went on to state in Appeal No. 93028 that:

> In a recent case, Texas Workers' Compensation Commission Appeal No. 93001, decided February 19, 1993, we reversed and remanded a case where the parties had not been given sufficient time to respond to a designated doctor's report at the close of the hearing, much as the case here, where the hearing officer apparently invalidated the designated doctor's report, when the correct edition of the AMA Guides had never been at issue. In the cited case we observed that "[h]ad a period of time been specified for comment by the parties regarding the designated doctor's report prior to the decision, this remand may have been avoided." Similarly had the hearing officer indicated that an improper version of the AMA Guides was used prior to his decision, the matter might have been resolved at the CCH level.

The need or desirability for the Commission to select a second designated doctor should be very limited and restricted to a situation such as, for example, where an initially appointed doctor cannot or refuses to comply with the requirement of the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993. Misunderstandings and inadvertent errors that can be readily explained or easily cured

without prejudice to the parties should be done so at the earliest opportunity in the dispute resolution process, including the contested case hearing. This decision in no way suggests that a hearing officer, or for that matter any responsible officer in the dispute resolution process, should turn a blind eye to failures to comply with significant and essential requirements of the Act or Texas Workers' Compensation Commission Rules. Rather, the decision encourages early resolution of these matters.

The decision and order are reversed and the case is remanded for further consideration and for the hearing officer to take necessary action, including the development of evidence as deemed necessary and appropriate, to resolve the matter concerning the designated doctor's impairment rating. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge